

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH J. BRANDT,

Defendant-Appellant.

UNPUBLISHED

May 22, 2001

No. 216062

Wayne Circuit Court

LC No. 98-001637

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct with a person under the age of thirteen, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to two concurrent terms of twenty to forty years' imprisonment. We affirm.

Defendant argues that the admission of hearsay statements made by complainant, who was deemed incompetent to testify, violated defendant's confrontation rights. Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801; *People v Barlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is generally not admissible unless it falls within one of the exceptions to the hearsay rule. MRE 802. If it does, it is not barred by the hearsay rule and falls within a firmly rooted exception. Nor does it run afoul of the Confrontation Clause. *Vincent v Seabold*, 226 F3d 681, 686 (CA 6, 2000). In *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992), the Michigan Supreme Court did an extensive analysis of the application of MRE 803(4) in cases involving a statement made by a child declarant. The Court held that in order to establish trustworthiness of a child's out-of-court statement a reviewing court must look at the totality of the circumstances. *Meeboer, supra*, 439 Mich 324.

In the instant case, the corroborating physical evidence of the assault, evidence that defendant had the opportunity to commit the assault and the fact that the resulting diagnosis and treatment support the trustworthiness of complainant's statements regarding a sexual assault, all aid in the determination that complainant's statements were made for the purpose of receiving medical care or treatment. *Meeboer, supra*, 439 Mich 326. Therefore, complainant's statements were admissible under MRE 803(4).

Complainant's statements were also admissible as excited utterances. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. MRE 803(2). In order to fall within the excited utterance exception, a statement must meet the following criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion. *People v Hackney*, 183 Mich App 516, 522; 455 NW2d 358 (1990). In this case, complainant was sexually assaulted, and this is a startling event. *Id.*; *People v Straight* 430 Mich 418; 424 NW2d 257 (1988); *People v Layher*, 238 Mich App 573, 584; 607 NW2d 91 (1999). Complainant made her statements within hours after the attack. Moreover, the evidence showed that the complainant was under the sway of excitement precipitated by the assault. *Smith, supra*, 456 Mich 543, 550. Thus, complainant's statements were also admissible as excited utterances.

Defendant next contends that his trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires. *Id.* at 76-77.

At a *Ginther*¹ hearing, Williams, defendant's trial counsel, testified that the reason he did not object to the admission of complainant's hearsay statements was because he thought the objection would not be beneficial to his client since the statements would be admissible under a hearsay exception. Further, Williams wanted some of the hearsay statements to be admissible for strategic purposes. This Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429; 597 NW2d 843 (1999). As noted *supra*, Williams testified that he had a strategic reason for not objecting to complainant's hearsay statements. Accordingly, trial counsel did not render ineffective assistance when he did not object to the admission of complainant's hearsay statements.

Next, defendant argues that the trial court's comments denied him of his right to a fair trial. To support this contention defendant points to the following:

Not only is [defendant] charged with this and this person, but the prosecutor advises me that the victim or the alleged victim is a five-year-old. Ladies and Gentlemen, therefore, that brings an extra perception to this case. And why do I say extra? Because obviously the defendant is a full grown man. You're looking at him and he is charged with penetrating - - I don't know whether he - - what he

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

penetrated her with, it isn't necessarily his penis, I don't know. But I'll leave that to the proofs, I'll leave that to the prosecution, because the law doesn't require that penetration be about a penis. It simply means that the person was penetrated for sexual purposes.

Defendant also contends that, when the trial court told the jury that defendant was presumed innocent "even of this crime" during the trial court's explanation of the presumption of innocence, this statement was improper.

A defendant in a criminal trial is entitled to a neutral and detached magistrate of justice *People v Conyers* 194 Mich App 395, 398; 487 NW2d 787 (1992). The principal limitation on a court's discretion over matters of trial conduct is that its actions do not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The trial court's remarks must be reviewed in their entire context. *Paquette, supra*, 214 Mich App 340. In reviewing the remarks as a whole, it is clear that the trial court made these comments in an attempt to stress to the prospective jurors that they must remain fair and impartial no matter how abhorrent the crime defendant was charged with may have been. In *People v Hudgins*, 125 Mich App 140; 334 NW2d 241 (1983), during voir dire of a drug trial, the trial judge said that drug possession and use were undesirable. *Id.* at 148. This Court held that this remark did not require reversal, since the trial court did not suggest that the defendant participated in these activities. *Id.* In the instant case, the trial court expressed to the potential jurors that it understood that they may hear evidence that defendant penetrated complainant with his penis. Since the trial court knew that this type of evidence could be very disturbing to the potential jurors, the trial court continually cautioned the potential jurors that a jury has an affirmative duty to remain fair and impartial. Even if the trial court's statement was taken to mean that the trial court disapproved of sexual abuse, this does not require reversal, since the trial court never stated or implied that defendant had actually molested complainant. *Hudgins, supra*, 125 Mich App 148.

Defendant also contends that the trial court was biased towards the prosecutor. As an example of the trial court's bias defendant points to the following remark:

Now, the sister prosecutor [sic] has a client here. Who is the client, - the People of the State of Michigan, all of you, including the defendant, me and all of us. Everybody in this State of Michigan is this man's client at this moment. Why, because his case is brought in the name of the People of the State of Michigan which is the forum that these things are brought. And so, sir, the law says he who accuses must prove. . . . Mr. Beadle, we expect you to get the evidence and bring it forward to prove the allegations against this man. And so, sir, under your oath representing the People of the State of Michigan, your client, you, sir, have an affirmative responsibility to bring forth that evidence. The law imposes that responsibility on you now and throughout this case and we look to you to meet that responsibility to the best of your ability.

Again, defendant does not present this statement in its full context. *Paquette, supra*, 214 Mich App 340. In addition to the remark referred to by defendant, the trial court also told the jury that defendant need not present any evidence and that the jury could not infer anything from the defendant's decision not to present any evidence. In essence, the trial court simply enunciated to the jury the roles and responsibilities of each attorney.

Finally, defendant argues that the trial court's frequent sua sponte interruptions of Williams, which were usually accompanied by demeaning remarks, displayed a lack of impartiality in front of the jury. During his opening statement, Williams made reference to the fact that complainant would not be testifying, and because complainant was not testifying, the jury would not get a chance to evaluate complainant's credibility. After Williams made this assertion the following colloquy occurred between Williams and the court:

The Court: Counsel, you sound like you're making a closing argument. I mean, with all due respect to you, sir, I thought you were just going to talk about the evidence that, that you anticipated to be presented and then when it it's all over with argue about that evidence and the effect thereof. It sounds more like you're arguing about what the people should have presented and they haven't done anything yet.

Williams: I haven't, Judge, I have not commented about the witness - -

The Court: Well, but you're talking about a witness that they could and how they might evaluate that witness, if that witness appeared and et cetera, et cetera. That all may be fair comment at the end of it but I just kind of want you to tell them what you think, what you believe the evidence will show and then you can argue about what its effect is after it has been shown or failed to have been shown, that's all.

Williams: Okay, well fine.

The Court: Thank you.

Defendant also points to the following as examples of the trial court's misconduct: (1) when Williams' asked Bennett how old complainant was when Bennett interviewed complainant, the trial court asked Williams if he really needed that information since Faes had already given testimony regarding complainant's age; (2) during Williams' questioning of Bennett, the trial court berated Williams for asking questions that the trial court believed were not relevant; (3) the trial court criticized Williams in front of the jury for recalling Bowles and asking Bowles questions that had been asked and answered; and, (4) the trial court sua sponte interrupted and criticized Williams during Williams' cross-examination of Faes.

It is the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. *People v Sowders*, 164 Mich App 36, 48; 417 NW2d 78 (1987). Trial court's have wide powers of discretion in fulfilling this duty. *People v Johnson* 164 Mich App 634, 641; 418 NW2d 117

(1987). In the instant case, the trial court was attempting to remain in control of the proceedings and to make certain that only relevant material matters were brought before the jury. *Paquette, supra*, 214 Mich App 341; *Sowders, supra*, 164 Mich App 48. While at times skirting the edge, the trial court's conduct, comments and questions did not pierce the veil of judicial impartiality. *People v Burgess*, 153 Mich App 715, 720; 396 NW2d 814 (1986). Consequently, having reviewed all of defendant's allegations, we do not believe the record, viewed as a whole, shows bias on the part of the trial court. *Paquette, supra*, 214 Mich App 341.

Affirmed.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

I concur in result only.

/s/ William J. Murphy